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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

Nos. 687 and 688

METROPOLITAN TRUST CO., AS CONSERVATOR FOR STANLEY O. LAWRENCE, AN INCOMPETENT PERSON,
Plaintiff-Petitioner,

vs.

THE MUTER COMPANY AND LESLIE F. MUTER,
Defendants-Respondents.

RESPONDENTS' ANSWER AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Petitioner invokes Rule 38, Sub-section 1(b) of this Court in order to invoke its aid in the exercise of its supervisory powers to allegedly "correct" the judgment of the Court of Appeals for the Seventh Circuit reversing Petitioner's judgment theretofore recovered in the District Court.

Petitioner gives as the only reason for invoking this Court's supervisory power, his contention that the Court of Appeals "arbitrarily and capriciously refused to follow the fact findings of the District Court", which he contends was the only finding supportable by the evidence. It is clear that to come within Rule 38-1(b), there must be a showing that the Court of Appeals "has so far departed from the accepted and usual cause of judicial proceedings, * * * as to call for an exercise of this Court's power

of supervision." In a desperate attempt to come within the scope of this Rule, Petitioner, by misstatements, omissions and spurious syllogisms, grossly and ridiculously distorts the "questions presented", the evidence, the theory upon which he tried his case below, the principles of law applicable, and the basis upon which the Court of Appeals reversed the District Court, thereby attempting to make it appear that certain facts were controlling and not in dispute, and that the Court of Apeals acted in a shocking ignorance or wilful disregard of the facts and the law, Rule 52(a) of the Federal Rules of Civil Procedure, and the due process clause of the Fifth Amendment.

If this Court adheres to its Rule 38 with the result that the writ is refused (as it obviously should be) then Petitioner has the temerity to suggest that Rule 38 itself is unconstitutional (Pet. p. 7).

Since "only the questions specifically brought forward by the Petition for Writ of Certiorari will be considered" (Rule 38-(2)), Respondents will address themselves, at this stage of the proceedings, in answering the unwarranted construction of the Court of Appeals decision.

QUESTIONS PRESENTED.

Was the Court of Appeals in error in determining as a matter of law, under the controlling Illinois Rules of Decision, that plaintiff *had wholly failed to sustain his burden of establishing* (a) that a fiduciary relationship ever existed between the parties; (b) that plaintiff was overreached and injured through the execution and carrying out of said contract; and (c) that the release executed by plaintiff to defendant was procured by fraud or was made without consideration?

STATEMENT OF THE CASE.

The cause of action at the trial in the District Court was based upon an alleged existence of a fiduciary relationship between the parties, which it was contended was breached by the defendant, Leslie Muter, who over-reached his *cestui,* the Petitioner (hereinafter sometimes called plaintiff or Lawrence) in purchasing the latter's property under a contract which was the outgrowth of his creditor's liquidation plan. The complaint as filed in the District Court was based upon an alleged "breach of trust" of acquiring "trust property" without accounting or paying therefor (Par. 2 of Compl., Rec. 2, 3, District Court's Conclusions, Rec. 676-679).

Since the complaint also alleged facts which were inconsistent with, and therefore repugnant to such a relationship, and which showed the impropriety of the legal conclusion as to the existence of the fiduciary relationship and any fraudulent scheme, defendants challenged the sufficiency of the complaint (Rec. 41-52). The Court of Appeals expressly held that such allegations of plaintiff to be "without merit", thus expressly outlawing the basic premise of the complaint (Rec. 734).

At the trial in the District Court no evidence as to the existence of any fiduciary relation or a breach thereof was ever adduced which could support the District Court's findings that such relationship existed between the parties. It was natural, therefore, that the defendants appealed to the Court of Appeals, challenging the sufficiency of the evidence to support the judgment entered by the District Court in plaintiff's favor for $128,438.33 (Rec. 681-4).

The Court of Appeals reversed the judgment for plaintiff and directed judgment for the defendants (Rec. 743), basing its opinion, among other things, on the failure of proof to establish the existence of any fiduciary relationship by the plaintiff to the defendants, and the execution of the release covering any claim which plaintiff might have had.

Petitioner grossly misstates the basis of the Court of Appeals reversal when he says as to the release: "Upon that basis alone the Court reversed the judgment for plaintiff"; and in asserting that the majority opinion of the Court of Appeals agreed that the defendant "defrauded the plaintiff; that the plaintiff clearly was entitled to judgment on that basis alone; that the defendants had no defense for their fraud unless a release signed by plaintiff was supported by consideration" (Pet. p. 4).

We do not think that the Court of Appeals opinion or the evidence in the trial record below can be tortured to support such a statement.

THE EVIDENCE.

The undisputed evidence was that the plaintiff, Lawrence was an insolvent manufacturer of radio products who was completely in the hands of his creditors in 1938 (Rec. 5, 265, 417, 433, 420, 434). The Court of Appeals opinion stated that at such time, the plaintiff was "admittedly insolvent" (Rec. 732). The defendant Muter, *not* one of those creditors, was a successful manufacturer of radio products. Muter first met plaintiff when the creditors and plaintiff asked him to acquire the latter's business by purchase in order to pay off the creditors at 40 cents on the dollar (Rec. 263, 286, 732).

Prior to that time, both plaintiff and defendants were complete strangers, and no fiduciary relationship existed. It was admited that prior to the execution of the contract in May, 1938, there had never been any business dealings between them (Rec. 199, 200). The preliminary negotiations leading up to the contract were between Muter and the creditors' committee for plaintiff (Rec. 424-425) who sponsored the plan in asking all the creditors to accept it. Plaintiff was then doing business under the name of General Manufacturing Co.

This contract (Rec. 5-12) was executed by both parties, including initialing of each page. Succinctly, the contract, after reciting that plaintiff was insolvent, provided for Muter to loan $25,000 to a new General Manufacturing Corporation, by which the creditors were to receive 40 cents on the dollar for their claims, all taxes would be paid, the new corporation furnished with working capital, Muter to own 60% of the stock, Lawrence 40%, and Muter to have Lawrence's stock as security for his loan with specified

rights to acquire it *either by payment of cash at book value, or by exchange of stock of any new or merged corporation, whichever Lawrence should elect* (Rec. 10).

Thus for his "equity" in an insolvent business, the plaintiff was provided with an opportunity for employment (Rec. 11), plus a share in a new going business.

However, in 1939, prior to the war boom, the new General Manufacturing Co.'s business was still not profitable, and Muter decided that unless operating economies could be instituted to place the business on a profitable basis, General should be liquidated (Rec. 511).

This election of Muter's to "bail" out was strictly in accord with the terms of the contract between the parties (Par. 9 of Defendants' Ex. 10, Rec. 10-11). Muter, after discussion with Lawrence, proposed that General consolidate its activities with The Muter Company and move into the latter's building. This was later accomplished.

Thereafter in pursuance of par. 8 of the contract (Rec. 10), on April 21, 1939, Lawrence received 2,000 shares in The Muter Company in exchange for his stock interest in General (Rec. 514-5). It should be noted that he did not ask for cash equivalent to the book value of his stock in General, in lieu of the 2,000 shares of The Muter Company, as he might have elected to do under Par. 8 of the contract (Rec. 10). The record is undisputed that plaintiff Lawrence received substantial value for his "sale" of his interest in an insolvent business. In addition to a job in a new going concern, for which he received $44,713 from 1938 to 1945, he also owned 2,000 shares of Muter stock, which at the time of the trial was valued at $8.25 per share (Rec. 649), and therefore had a market value of $16,500.

From January 1, 1941 to March 1942, Lawrence had a

drawing account and was paid 10% of the profits of the "Gen-Ral" Division of The Muter Company. Later in 1942 this was changed to 5% of the profits of The Muter Company, all of which was paid for his services (Rec. 529-32).

In June 1943, apparently with hindsight envy, (Rec. 740) Lawrence asserted to Muter that he had or should have a further undefined "interest" in the business apart from his commission and stock ownership of 2,000 shares. Muter told him he had no "interest", and in view of Lawrence's claims he wanted that settled once and for all (Rec. 534-5).

After discussion between the parties, which terminated in plaintiff's securing an increase in salary and continued tenure with the company, he executed a release to Muter, his employer, abandoning his "alleged claim" (Rec. 36). After almost a year had passed, Muter made some changes in the sales organization of the company by bringing in new personnel (Rec. 542). This produced dissatisfaction in Lawrence, and he consulted an attorney under whose direction he began a series of letters to The Muter Company demanding money for his "interest" (Rec. 220-5). These letters were sent in the summer of 1944 and the spring of 1945. A climax was reached when Lawrence attempted to interfere with a registration statement of The Muter Company before the Securities and Exchange Commission (Rec. 142-7). Then followed his letter on May 14, 1945 to the defendants demandng $50,000 and "income taxes" for his alleged "interest" (Pltff's Ex. 65, not printed, Rec. 224). The next day he was discharged (Rec. 547) and fourteen months later filed his complaint in the District Court. Thus, it was over seven years from April 1939, when he accepted the 2,000 shares of The Muter Company stock for his "interest" in his own company, in accordance with the terms of his contract with defendants,

until the instant suit was filed, a suit clearly barred by the pleaded laches or limitation (Rec. 41).*

Plaintiff's complaint in the instant case was based entirely on an alleged breach of trust. The District Court, adopting this erroneous premise and basing its entire decree on findings of the existence of a fiduciary relationship, when the evidence wholly failed to support such a position, entered a judgment for plaintiff for $126,000.00 (Rec. 676-79).

Since it is here clear that Petitioner understates many of the essential points in the majority opinion of the Court of Appeals, and unduly emphasizes the point thereof dealing with the release in disregard of all other points of such opinion, any one of which was decisive of the case, we feel it necessary to discuss the Court of Appeals' decision at some length, as a basis for Respondents' contention that this petition should be denied.

* The applicable Illinois limitation period is five years. Ill. Revised Stat. Chap. 83, Par. 16; *Bunker Hill C. C.* v. *McElhatton* 282 Ill. App. 221, 237; *Herr* v. *Payson*, 157 Ill. 244.

THE ARGUMENT.

I.

The Unanimous Rejection by the Court of Appeals of the Basic Promise of the Trial Court That a Fiduciary Relationship Existed Destroys the Validity of the Findings and the Decree Based Thereon.

Both the majority and the dissenting opinions of the Court of Appeals agreed that as a matter of law, a fiduciary relationship was not shown to have existed between the parties (Rec. 729-740).

This represented a rejection of the basic premise upon which the entire fabric of the plaintiff's case rested, and upon which the trial court's findings and judgment were constructed. (Dist. Ct.'s Findings 5, Rec. 671 and Conclusion 4, Rec. 676.)

Based entirely upon the erroneous basic premise that a fiduciary relationship existed, the trial court improperly threw the burden of the proof upon the defendants; admitted the otherwise inadmissible oral testimony of the plaintiff to vary the clear terms of the contract and the release (which evidence was the only evidence that plaintiff relied on to establish the fact that he was to get "more" than that for which the contract provided); improperly construed the contract between the parties on the theory that it should be construed strictly against the defendant since he was a Trustee; and held the defendant accountable on the erroneous theory that he was a Trustee who should not make a profit in dealing with a beneficiary (Rec. 676-8). The profits, of course, came from the "war" business not forseeable at the time of the contract in 1938.

Obviously, then, upon a review of these erroneous basic premises, when the Court of Appeals unanimously determined that there was no evidence at all to support the finding and conclusion that a fiduciary relationship existed between the parties, the trial court's findings based thereon had no validity.

Since both the majority and the dissenting opinions of the Court of Appeals found that no fiduciary relationship existed, it is readily seen that the Petitioner herein has *grossly over simplified* the basis of the reversal when he states that the majority opinion agreed that the defendants defrauded the plaintiff; and that Plaintiff was entitled to judgment on that basis alone unless the release signed by plaintiff was supported by consideration (Pet. p. 4).

A fair construction of the majority opinion indicates that it has demolished the structure of plaintiff's case and the findings and judgment of the trial court on a point by point basis.

II.

There Was a Total Failure in Plaintiff's Evidence to Establish a Cause of Action.

Petitioner is in error in contending that he could and would have recovered had it not been for the release. Petitioner tortures this premise from the language of the majority opinion preceding its reference to the case of *Howard* v. *Howe*, 61 F. (2) 577, (Rec. 736).

It is true that in considering whether the doctrine of *Howard* v. *Howe, might,* but for the release, be properly applied under the facts and circumstances of this case, the majority opinion made certain assumptions of fact and expressly said that they would not analyze the record (Rec. 735). Thus the majority *assumed* that the evidence showed that the defendant Muter had a fraudulent intent in April

1939; *assumed* that at the time of the exchange, the defendant promised plaintiff to give some *unspecified* additional consideration to him over and above the 2,000 shares of Muter Co. stock, and reiterated such promise on numerous subsequent occasions; *assumed* that such promises were made solely to lull and delude plaintiff; and *assumed* (despite serious reservations as to the relative values of the two blocks of stock) that the 2,000 shares of Muter Co. stock were an inadequate consideration (Rec. 736). If the facts actually corresponded with all of these assumptions, then, in the view of the majority opinion, the doctrine of *Howard* v. *Howe* would be applicable, but for the release.

Actually, if the facts and evidence did truly correspond with all these assumptions, then the Court of Appeals would no doubt have held that a fiduciary relationship had been established, with the result that all the legal consequences of such fiduciary relationship would necessarily follow, and with the result that the defendant Muter could have then been under equitable strictures to assume the burden of proof in establishing the fairness of his bargain, and to account for any profits made by him in his venture with his *cestui*.

Obviously these assumptions of the majority opinion were made only for the purpose of argument so that a theoretical premise could be laid for the consideration of the effect of the release. In effect the majority held that, *assuming solely for the purpose of argument the worst facts possible from defendants' standpoint,* nevertheless the liability which might arise under the doctrine of *Howard* v. *Howe* was effectively released.

While the majority chose to make these assumptions in order to lay a theoretical premise for the consideration of the effect of the release, *it found the true facts to be directly opposite, in substance, as appears from the opinion and the necessary inferences to be taken therefrom. The*

Court of Appeals opinion was based upon the following fundamental premises:

1. That there was no fiduciary relationship;
2. That Defendant Muter never over-reached plaintiff, and thus by necessary implication, that plaintiff sustained no injury and suffered no damages;
3. That defendant Muter had no fraudulent intent when the parties started their dealings, which resulted in benefits, not losses, to plaintiff;
4. That the contract between the parties was valid and voluntarily entered into by both parties and that plaintiff received *all* of the stock in The Muter Company to which he was *entitled* under the terms thereof;
5. That even if it be assumed that defendant Muter's intent at the time of the exchange was fraudulent, nevertheless, the release was effective and controlling.

The essence of the doctrine of *Howard* v. *Howe* is that a fiduciary relationship existed and that the fiduciary fraudulently obtained the property, *i. e.* the *res* from the beneficiary for which he should account. In the language of the Court in

Howard v. *Howe,* (C. C. A. 7) 61 F. (2d) 577, at p. 579:

> "The oral testimony and the documentary evidence are such as to convince us that the District Court was amply justified in finding that there came into existence *a confidential and fiduciary relationship* upon the part of the officials of the company toward the appellee, *which led him to rely implicitly upon the misrepresentations and false promises of such fiduciaries.* * * * *As a result the employer and its participating officials became constructive trustees for appellee.*" (Emphasis supplied.)

Where, as here, the Court of Appeals unanimously determined that no fiduciary relationship existed, obviously, the doctrine of *Howard* v. *Howe* had no application. And

going further, where, as here, the Court determined that the plaintiff was not over-reached—in effect not injured—not damaged—*even if a fiduciary relationship existed, there would be nothing to recover.*

Thus, it may be seen that Petitioner is grossly misstating and distorting the majority opinion in asserting that the Court of Appeals held that plaintiff would have had a clear right to recover as in a case of common law fraud and deceit but for the release. Actually, both the rule of this case and the well established law is that only where a fiduciary relationship existed as a matter of law would the plaintiff ever have had a right to recover, and then only if he was over-reached and deprived of his trust *res.* Having determined that no fiduciary relationship existed, there remained no basis in law to support plaintiff's judgment. While it is true that the majority opinion did state that:

> *"In our view, the disposition of this case turns on the effect of the release,"*

nevertheless, we believe the fair and reasonable interpretation of the majority opinion is that the case was being decided on the basis of all the points made by the Court, as above listed, including the point that the release was valid and effective; *and that even if the other points were disregarded, the additional fact that a valid and effective release was given was, as a matter of law, sufficient, in and of itself, to justify reversing the judgment.*

The Court of Appeals expressly stated that:

> "The plaintiff's testimony that he released the defendants from all claims on Muter's promise to give him an additional interest, thereby retaining the very claim purported to be liquidated by the release, is a patent contradiction that we find impossible to reconcile. The written terms of the release must govern." (Rec. 737.)

Yet petitioner blandly states that "Muter was guilty of actual fraud in procuring his signature to the release" (Pet. p. 16). What *actual* fraud petitioner is speaking of, he does not define—certainly none of the recognized elements of fraud were present. Even if it be assumed that Muter was guilty of fraud (which he most certainly was not) yet plaintiff could not recover for he was not injured, to the contrary he was benefited, under the express finding of the Court of Appeals (Rec. 740).

See:

Boatmen's Nat. Co. v. *Elkins Co.* (C. C. A. 8), 63 F. (2d) 214, 216.

Nor did the defendants ever contend that the "salary increase" of June 29, 1943, was not paid for plaintiff's services. Yet, it nevertheless had a definite bearing on the release which was simultaneously executed under seal by the plaintiff. In executing said release, the plaintiff gave up nothing of any actual value, but only a *claim* that was wholly without foundation. This alleged *"claim"* was that as Muter was his trustee, plaintiff was entitled to an accounting of his alleged "interest" as a beneficiary of a trust.

The evidence was clear that Muter told plaintiff that if this salary increase was put into effect and made retroactive to February 1, 1943, he wanted it understood that there would be an end of plaintiff's alleged claim of an additional "interest" in The Muter Company, other than as a stockholder owning the 2,000 shares received by him in the exchange on April 21, 1939 (Rec. 535). This was done by the agreement of the parties.

Petitioner's specious argument that on June 29, 1943, he was being asked to release and relinquish anything of value is wholly without merit, and is based upon his continued adherence to his theory of a fiduciary relationship,

for without that premise, he has nothing upon which to base his claim.

Petitioner attempts to distort Muter's testimony and the pleadings so as to make it appear that Muter said that the salary increase was not intended as consideration for the release (Pet. p. 6). Upon analysis of the testimony of Muter relied on by petitioner in this regard, the substance of Muter's testimony is as follows:

(a) The only stock given to Lawrence for his stock in general was the 2000 shares of Muter Co. stock.

(b) The only cash paid to Lawrence after December, 1939, was for services, as salary.

(c) But in addition to the above, The Muter Co. gave Lawrence an opportunity to continue working for the company, although it could have dismissed him, and to make and enjoy considerably higher wages than he would have otherwise (Rec. 186).

It is clear that Muter had in mind the important larger question of whether he should continue to employ this disgruntled and irrational employee at all, at any wage; and that such a question was resolved in Lawrence's favor upon execution of the release. It was precisely the recognition of this situation which captured the attention of the Court of Appeals and led it to hold that the "increase in compensation ties in with and supplies valid consideration for the release" (Rec. 738). Obviously, by foregoing the right to discharge plaintiff who had given sufficient provocation for so doing by his recurring demands, and instead, by retroactively increasing his salary for his services which the company had no obligation to grant, even if we assume he may have merited such increase, the company gave ample consideration in law for the release.

III.

The Review by the Court of Appeals of this Case Was in Accord With Rule 52(a) of the Federal Rules of Civil Procedure, and in Accord With the Applicable Rule of Decision in Illinois, and in the Court of Appeals for the Seventh Circuit.

Although the trial court concluded as a matter of law that defendant Muter stood in a fiduciary relation to plaintiff Lawrence (Concl. 4, Rec. 676) it was defendants' position in the Court of Appeals that the testimony presented wholly failed to support the District Court's findings and conclusions.

The Court of Appeals rejected as "clearly erroneous" the District Court's conclusions and findings that a fiduciary relationship existed between the parties. *Lawrence* v. *Muter,* 171 F. (2d) 380 (Rec. 731-742).

The existence or nonexistence of a fiduciary relationship, and the existence or nonexistence of fraud is always a mixed question of law and fact. *Ogilvie* v. *Knox Mach. Co.,* 59 U. S. 490, 18 How. 577.

It is well established that in an equity action such as this, where the facts are found by a District Court without a jury, a reviewing Court is not bound by the determinations of the trial judge *on a mixed question of law and fact.*

> *U. S.* v. *U. S. Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 746.

See also:

> *Bogardus* v. *Comm.* (1937), 302 U. S. 34, 39.
> *Bell* v. *Porter* (C. C. A. 7), 159 F. (2d) 117, 120.
> *Exmoor Country Club* v. *U. S.* (C. C. A. 7), 119 F. (2d) 961.

Becker v. *Loew's, Inc.* (C. C. A. 7), 133 F. (2d) 889, 894.

U. S. v. *Anderson* (C. C. A. 7), 108 F. (2d) 475, 479.

Furthermore, the finding of the existence of a fiduciary relationship is clearly one of law, or at most, a mixed question of law and fact under the Illinois rule of decision, which holds that such relationship may never be established, except by "proof clear, convincing and so strong as to lead but to one possible conclusion."

Stewart v. *Sunagel*, 394 Ill. 209.

Finney v. *White*, 389 Ill. 374.

Johnson v. *Lane*, 369 Ill. 135.

Whether the proof of a fiduciary relationship was indeed so clear, so convincing, and so strong in the case at bar "as to lead to but one possible conclusion" was properly a question of law for the Court of Appeals to decide.

Vargas v. *Esquire* (C. C. A. 7), 166 F. (2d) 651 (Cert. denied 335 U. S. 813).

Although the Illinois rule of decision as to the high and strict degree of proof in a case of this type is undisputed, the trial court wholly disregarded it, and applied an erroneous and improper burden of proof on the defendants (Concl. 7, 9, Rec. 676-7).

It is, therefore, clear that the District Court's conclusions of law or of mixed law and fact as to the existence of a fiduciary relationship and that there was fraud practiced on the plaintiff were not binding upon the Court of Appeals, and in reaching contrary conclusions, the reviewing court was acting well within its proper powers of review as prescribed by Rule 52(a) of the Rules of Civil

Procedure. It therefore did not abuse its appellate powers as petitioner contends.

Actually, apart from plaintiff's own oral, unsupported, and improbable testimony, denied by defendant, that defendant Muter promised him *more* than the written terms of the contract specified, there was no serious dispute in the evidence bearing on the question of the existence of the fiduciary relationship between the parties, or even the existence of any trust *res*. Collectively, it presented a simple question of law for determination by the Court of Appeals.

The Court of Appeals having correctly discharged its function in determining as a matter of law that no sufficient evidence, in fact no evidence at all, existed upon which to base such a fiduciary relationship, properly determined that the District Court's findings and conclusions were without validity.

Vargas v. *Esquire*, 166 F. (2d) 651, 654 (C. C. A. 7).

It is interesting to observe that Judge Kerner, who wrote the opinion for the Court of Appeals reversing District Judge Igoe on the same basic grounds in the *Vargas* case, was the dissent in the case at bar, where the plaintiff's case was far weaker than *Vargas'* case, as pointed out by Judge Minton (Rec. 740). District Judge Igoe was the trial judge in both cases and obviously had a fundamentally erroneous perception of what constituted a fiduciary relationship as a matter of law.

Conclusion.

Contra to petitioner's contentions, the Court of Appeals decision was not based upon a finding of fact that the release alone wiped out and destroyed an existent cause of action, but rather upon several grounds including the basic holding that no fiduciary relationship ever existed between the parties, *as a matter of law*.

It is respectfully submitted that the petitioner has shown no reason for granting of a writ of certiorari to the Court of Appeals to review this case, and the issuance of the writ should be denied.

Respectfully submitted,

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